

# Rethinking Lawyer Advertising Rules

By Mark L. Tuft

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Ever since a total ban on lawyer advertising was held to be unconstitutional,<sup>1</sup> the legal profession has encountered problems in regulating lawyer advertising. Regulators attempt to prohibit legal advertising that is considered false or misleading with an expanding array of complex and inconsistent rules. This mix of unconformable regulations has failed to keep pace with changes in technology that are enabling innovative electronic dissemination of information about lawyers and legal services. Many states have regulations that prohibit particular statements by lawyers as either inherently misleading or likely to mislead the public. Others have regulations requiring advertisements to include particular information, ostensibly to protect consumers from being misled. Most of these rules relate back to outdated methods of communication and have become increasingly unworkable in the age of electronic media advertising.

The most significant change in the world of advertising has been the advent of the Internet. The legal profession has been discussing the importance of the Internet in attracting clients and disseminating useful information about the law and legal services for more than a decade.<sup>2</sup> Internet-based lawyer advertising is now accepted practice, and the public relies on the Internet as a leading source of information about lawyers and the availability of legal services.<sup>3</sup> Online and other electronic forms of advertising are dominant in an age when market forces strongly favor e-commerce.

The recent explosion of social media, professional networking services, and mobile technology has further rendered the regulation of lawyer advertising by state regulatory agencies ineffective.<sup>4</sup> There is a growing disconnect between the way lawyers are expected to communicate with prospective clients in accordance with existing rules and the way the public communicates with everyone else and seeks information about legal services.<sup>5</sup> Overly restrictive, dated, and unrealistic regulations have proven to be a mismatch for emerging communication technologies and sophisticated methods of marketing legal services – like trying to follow the rules of the road from before the time of automobiles.

The increasing use of the Internet and mobile technology has resulted in borderless forms of Internet-based advertising. Yet advertising rules vary significantly from state to state on substantive and technical issues. There is a tacit understanding that this regulatory patchwork is increasingly irrelevant and ineffective: many regulations are not uniformly enforced, and in some cases regulations are not enforced at all. The current complex array of detailed regulations fails to achieve stated objectives while often confounding lawyers trying to decipher which state's rules control Internet-based advertising.<sup>6</sup>

This confused state of affairs has an obvious chilling effect on lawyers utilizing advances in technology to communicate accurate information to consumers who want more, not less, information about legal services. It also challenges the legal profession's capacity to maintain enforceable rules that are constitutionally sustainable and that assure, to a reasonable degree, that consumers are receiving accurate and non-misleading information about lawyers and legal services.<sup>7</sup>

Consider the following example: an attorney has a personal profile page on a social media website and regularly posts comments about her personal life and professional practice on that profile page. The attorney has 500 approved contacts who are a mix of personal and professional acquaintances, including persons the attorney does not know. The attorney posts the following remark on her profile page: "Another great victory in court today. My client is delighted. Who wants to be next?" According to a recent State Bar of California ethics opinion, the words, "Who wants to be next?" is a communication concerning the availability for professional employment, and thus the entire message is subject to the rules and standards regulating lawyer advertising.<sup>8</sup> The opinion concludes that the posting violates California's prohibition on client testimonials ("My client is delighted"), because it fails to include a disclaimer. It violates California's rule on guarantees, warranties, and predictions because it includes the phrase "victory." It also violates the requirement that the posting include the words "advertisement," "newsletter" or words to that effect. Because of her choice of words, the lawyer was also obligated under the California rules to archive her post for two years.

Another recent ethics opinion advises that a lawyer may respond to an individual who posts about a specific client problem on Twitter or Reddit via the same medium. However, if the lawyer describes her capabilities or experience rather than merely discussing the individual's legal problem without mentioning her services, the lawyer's response is subject to the advertising rules requiring, among other things, that the response be labeled as "advertising" and include the law office address and phone number and that the response be retained for one year.<sup>9</sup> Other ethics opinions caution against lawyers listing their abilities and areas of practice in social networking platforms that have sections entitled "specialties" or "skills and expertise," since doing so may result in the lawyer engaging in potentially misleading advertising under their state's advertising rules.<sup>10</sup> These overly technical opinions impose impractical obligations on lawyers and unreasonably deter lawyers from using Internet-based client development tools that are not fraudulent or deceptive.

It is time to reexamine the lawyer advertising regulatory model by focusing on clarity and relevance through simplified rules that prohibit false and misleading advertising while leaving behind ineffective, extraneous, and often unconstitutional rules that in effect legislate good taste.

### **Addressing the Inutility and Inconsistencies of Current Advertising Regulations**

A committee of the Association of Professional Responsibility Lawyers ("APRL") studied various state approaches to regulating lawyer advertising and gathered empirical data regarding the enforcement of advertising rules by state regulators. The committee's report, issued in June 2015, identifies legal and practical consequences of over-regulation and low level enforcement of complex and inconsistent regulations. The report proposes a practical solution for bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement while enabling consumers to receive accurate and

non-deceptive information.<sup>11</sup> The committee received valuable assistance from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel (“NOBC”). The committee obtained, with NOBC’s assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules by state disciplinary authorities. The committee received survey responses from 34 of 51 jurisdictions. The survey responses confirm that complaints about lawyer advertising are rare.<sup>12</sup> The survey found that people who complain about lawyer advertising are predominantly other lawyers and not consumers.<sup>13</sup> According to the survey results, a majority of complaints about lawyer advertising are handled informally, even when there is a provable advertising rule violation.<sup>14</sup> Few states engage in active monitoring of lawyer advertisements.<sup>15</sup> Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c), independent of the rule or rules specific to advertising practices.<sup>16</sup>

The APRL committee considered other surveys and materials regarding the attitude of bar regulators and consumers toward lawyer advertising enforcement that reported similar findings.<sup>17</sup> The committee also considered the constitutional standards for regulating commercial speech, the proliferation of legal ethics opinions on lawyer advertising, and the paucity of disciplinary decisions enforcing lawyer advertising rules. Several notable case decisions in the last decade have held that lawyer advertising regulations in various states failed the *Central Hudson* test, which bars regulation on the grounds of taste as violative of freedom of expression.<sup>18</sup> Anti-competitive concerns with current lawyer advertising regulation were also considered by the APRL committee. The Federal Trade Commission (“FTC”), for example, has on occasion reminded various state regulatory agencies that overly broad advertising restrictions not only reduce competition and violate federal antitrust laws, but also restrict truthful information about legal services.<sup>19</sup> Many lawyer regulatory agencies are monitoring the recent US Supreme Court decision in *North Carolina State Board of Dental Examiners v. F.T.C.*<sup>20</sup>, in which the Supreme Court found that the Board of Dental Examiners’ exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The concern is that this precedent could arguably be applied to lawyer disciplinary authorities, especially if it appears that the lawyers making decisions on what is permissible lawyer advertising are competitors and there are no clearly articulated objective criteria for determining if the advertising of the competitors violates the rules of professional conduct.

APRL’s report identifies deficiencies in current regulations that demonstrate the need for a realignment of the balance between the core values of professional responsibility and effective lawyer advertising. State rules on lawyer advertising are largely based on print and other forms of traditional advertising. Lawyers and law firms face difficult challenges in making sure that their online advertising conforms to standards that for the most part were formulated in the last century. The traditional advice that lawyers should comply with the most restrictive rule when faced with competing state regulations (the “least common denominator approach”),<sup>21</sup> is no longer practical or necessarily comprehensible. The requirements of each state often vary greatly, such that compliance with each jurisdiction’s rules is not always feasible.<sup>22</sup> The ABA Model Rules of Professional Conduct have not been uniformly adopted and the ABA Commission on Ethics 20/20’s recent effort to modernize the advertising rules has been enacted by only a few states.<sup>23</sup> Choice of law problems confronting lawyers and state regulators often outweigh public protection and have had a negative effect on the dissemination of useful information. For example, each state has varying labeling, disclosure, and record-keeping requirements.<sup>24</sup> The lack of predictability

with respect to how a particular bar regulator will view a given advertisement is an increasingly difficult problem for lawyers and law firms. This problem is compounded by inconsistent enforcement and overly technical advisory opinions on the application of existing rules to new technologies.

APRL found that there is a lack of empirical research demonstrating a correlation between the proliferation of regulation and underlying consumer harm justifying that regulation. Yet the trend persists: the proliferation of lawyer advertising in an electronic age has been met by greater regulation, however ineffective. Significant dissimilarity exists among state rules that seek to regulate potentially misleading communications or specific content such as past results, the listing of lawyer specialties, inclusion of endorsements and testimonials, and the use of symbols, dramatizations, rankings, slogans, and even background music (sometimes referred to as “attention-getting techniques”). The regulation writers’ justifications for many of these variances include concerns about the negative image of lawyers and the lack of respect for the judicial system.<sup>25</sup> Indeed, the traditional reason for prohibiting lawyer advertising was that it was “unprofessional.”<sup>26</sup> Yet in *Central Hudson*, the Supreme Court could not have been more clear: regulation of taste, dignity, and professionalism is outside the permissible scope of regulation.<sup>27</sup> Nevertheless, many state regulations continue to prohibit unseemly content in the name of misleading or potentially misleading advertisements.<sup>28</sup>

### **Common Sense Approach to Regulating Lawyer Advertising**

Given the survey results and other information received from regulators, ethics opinions, and case law, APRL concluded that the practical and constitutional problems with current state regulation of lawyer advertising far exceed any actual benefits, in terms of protection of the public and maintaining the integrity of the legal profession. Lawyers should not be subject to discipline for “potentially misleading” advertisements or advertisements that are considered distasteful or unprofessional. Nor should lawyers be subject to discipline for violation of technical requirements regarding font size, placement of a disclaimer, or advertising record retention. Regulators should use non-disciplinary measures to address lawyer advertising and marketing that does not violate Model Rule 8.4 principles.

APRL has proposed a two-prong approach to regulating lawyer advertising: (i) having a single rule patterned on Model Rule 8.4(c) that prohibits false and deceptive advertising, and (ii) standardizing non-disciplinary responses to common lawyer advertising complaints. APRL proposes that the prohibitions in Model Rule 7.1 be retained and that Rules 7.2, 7.4, and 7.5 be replaced with comments to Rule 7.1 that reflect the principles contained in those rules, that will provide guidance on the “false and misleading” standard in Rule 7.1. APRL has deferred considering issues relating to the regulation of direct solicitation of clients and communications transmitted in a manner that involves intrusion, coercion, duress, or harassment (Model Rule 7.3). Consideration regarding the effect of certain forms of lawyer advertising and marketing on the regulation of lawyer referral services has also been deferred.<sup>29</sup>

Adopting a disciplinary standard of prohibiting “false and misleading” lawyer communications is consistent with Model Rule 8.4(c), which prohibits lawyers from engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation.” A straightforward “false and misleading” standard for lawyer com-

munications about legal services satisfies the proper constitutional objectives of regulating lawyer advertising and balances the important interests of access to justice and protection of the public and clients, and promotes uniformity in the regulation of lawyer conduct.

APRL's second proposal deals with enforcement. Experience has shown that most reported breaches of the advertising rules are technical or minor in nature and do not involve actual deception or consumer harm. Routine complaints about lawyer advertising can better be addressed in a non-disciplinary framework, rather than as a disciplinary investigation, by having regulatory staff communicate with a noncompliant lawyer on a more informal basis to obtain voluntary compliance. Experience has also shown that, with few exceptions, lawyers will take action to bring their advertising into compliance once the matter is brought to their attention. If the lawyer makes a satisfactory correction or provides a satisfactory explanation, the public will be served. Processing all lawyer advertising complaints through the lawyer disciplinary system takes time and expense and syphons bar resources and attention away from investigation of more serious lawyer misconduct. Situations in which formal discipline should be invoked include conduct that constitutes a violation of Model Rule 8.4(c) and situations involving coercion, duress, harassment, or intimidation that create a risk of demonstrable harm. Discipline may also be warranted when lawyers who have been notified of actual noncompliance either fail to respond or continue to violate the rules.<sup>30</sup>

### Conclusion

APRL is not advocating that states abdicate their regulatory authority over lawyer advertising. Instead, APRL's solution addresses the inutility of over-regulation and under-enforcement of lawyer advertising rules in an era of broadly diverse and changing technologies. Consolidating the regulation of lawyer advertising into a single disciplinary rule that prohibits false and misleading communications, combined with more uniform enforcement policies and procedures by state disciplinary authorities, is the best way to ensure honest communications by lawyers while promoting the widest possible access by the public to legal services.

### Endnotes

1. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381-382 (1977).
2. See, e.g., Christopher Hurd, *Untangling the Wicket Web: The Marketing of Legal Services on the Internet and the Model Rules*, 17 GEO. J. LEGAL ETHICS 827 (2004); Margaret Hensler Nicholls, *A Quagmire of Internet Ethics Laws and the ABA Guidelines for Legal Website Providers*, 18 GEO. J. LEGAL ETHICS 1021 (2005); Nia Marie Monroe, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, 18 GEO. J. LEGAL ETHICS 1005 (2005); Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?*, 2005 PROF. LAW. SYMP. ISSUE, at 45 (2005); J. Clayton Athey, *The Ethics of Attorney Websites: Updating the Model Rules to Better Deal With Emerging Technologies*, 13 GEO J. LEGAL ETHICS 499 (2000).
3. ABA COMMISSION ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER CONCERNING LAWYERS' USE OF INTERNET BASED CLIENT DEVELOPMENT TOOLS (Sept.10, 2010) [hereinafter CLIENT DEVELOPMENT TOOLS ISSUES PAPER], [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/clientconfidentiality\\_issuespaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientconfidentiality_issuespaper.authcheckdam.pdf).
4. *Id.* at 1-2.

5. For example, according to a Pew Research Center 2014 Social Media Update, for the 81% of American adults who use the Internet, 52% of online adults now use two or more social media sites; 71% are on Facebook, 70% engage in daily use, 23% use Twitter and 26% use Instagram.

6. Ethics 20/20 considered, without recommending any change, whether ABA Model Rule 8.5 (Choice of Law) offers an adequate means for determining which states' ethics rules apply to Internet-based communications. See CLIENT DEVELOPMENT TOOLS ISSUES PAPER, *supra* note 3, at 2, fn 1.

7. *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

8. Cal. State Bar Formal Op. 2012-186.

9. N.Y. State Bar Ass'n Formal Op. 1049 (2015).

10. See, e.g., N.Y. State Bar Ass'n Formal Op. 2013-972 (2013); Fla. Bar Advisory Op. (2013), available at <http://it-lex.org/wp-content/uploads/2013/09/Florida-Bar-Opinion-re-LinkedIn-Redacted.pdf>.

11. ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE (2015), [https://www.aprl.net/publications/downloads/APRL\\_2015\\_Lawyer-Advertising-Report\\_06-22-15.pdf](https://www.aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf). The Committee consists of former and current bar regulators, law school professors, authors of treatises on the law governing lawyers and lawyers who are experienced in the field of professional responsibility and legal ethics.

12. In response to the question how often complaints about lawyer advertising are received, 56% responded, "rarely," 17% responded, "almost never," and 8% responded, "frequently."

13. In response to the question, "Who are the predominant complainants in lawyer advertising charges?" 78% responded that it was other lawyers; 3% responded that it was consumers.

14. The survey responses reported that in some cases, advertising complaints involving a provable advertising rule violation are handled with warning letters, diversion, dismissal of formal charges, changes in advertising language, and other dispositions.

15. Only 17% of the jurisdictions responding reported that they actively monitor lawyer advertisements.

16. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." In response to the question: "How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions, including diversion and probation," 50% responded, "rarely," 36% responded "almost never," and 6% responded, "frequently."

17. See, e.g., Donald R. Lundberg, *Some Thoughts About Regulating Lawyer Advertising*, 34 ABA Nat'l Conference on Prof'l Responsibility (2008); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).

18. See, e.g., *Harrel v. The Florida Bar*, 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010); *Public Citizen v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011); *Rubenstein v. The Florida Bar*, No. 14-CIV-20786, 2014 WL 6979574 (S.D. Fla. Dec. 9, 2014); *Searcy et al. v. The Florida Bar*, Complaint No. 4:13CV00664, 2013 WL 6493683 (N.D. Fla. Dec. 11, 2013).

19. ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising*, [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_ethics\\_in\\_lawyer\\_advertising/FTC\\_lawyerAd.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html).

20. 135 S. Ct. 1101 (2015).

21. See PA. Bar Ass'n Comm. Legal & Prof'l Responsibility, Informal Op. 98-85 (1998).
22. Monroe, *supra* note 2, at 167; Daniel Backer, *Choice of Law in On-line Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 *FORDHAM L. REV.* 2409, 2418 (2002).
23. ABA CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Prof'l Conduct*, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_7\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1.authcheckdam.pdf).
24. J.T. Westermeier, *Ethics and The Internet*, 17 *GEO. J. LEGAL ETHICS* 267, 282 (2004).
25. Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 *J. TECH. L.& POL'Y* 63 (2012); Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 *ARK. L. REV.* 437 (2006).
26. ABA CANONS OF PROF'L ETHICS, Canon 27 (1908), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons\\_Ethics.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf).
27. Under *Central Hudson*, the government can regulate commercial speech when: 1) the speech is either misleading or related to illegal activity; 2) there is a substantial government interest in regulating the speech; 3) the regulation or restriction directly advances a government interest; and 4) whether the regulation is no more extensive than necessary to further the government's interest.
28. For example, in California, any depiction of an event such as an accident scene with or without sound effects, and any message referring or implying potential monetary recovery, including use of monetary symbols, creates a rebuttable presumption that the advertisement is false, misleading or deceptive. California Business and Professions Code §6158.1; several states ban endorsements and testimonials, portrayals and logos, mottos and tradenames that state or imply the ability to obtain results in a matter. See Am. Bar Ass'n, *Differences Between, State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct* (May 2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/state\\_advertising\\_and\\_solicitation\\_rules\\_differences\\_update.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.authcheckdam.pdf).
29. The Committee is also considering whether ABA Model Rule 7.2(b) on referral fees and 7.5 on specialization should be retained as separate rules.
30. The Virginia State Bar reports that it has used a non-disciplinary process successfully for five years in handling lawyer advertising complaints.